NOV 9 PAGE 3

Supreme Court, U.S.
FILED
OCT 25 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM, 1979

No. 79-465

NAVARRO SAVINGS ASSOCIATION,

Petitioner,

v.

LAWRENCE F. LEE, JR., BERT A. BETTS, ROBERT M. GREEN, WILLIAM A. LANE, JR., JAMES B. McINTOSH, FREDERICK H. SCHROEDER, JOHN W. YORK AND JACK H. QUARITIUS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Secondary Authorities

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The Respondents Lawrence F. Lee, Jr., Bert A. Betts, Robert M. Green, William A. Lane, Jr., James B. McIntosh, Frederick H. Schroeder, John W. York, and Jack H. Quaritius respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the Fifth Circuit's opinion. That opinion is reported at 597 F.2d 421.

QUESTION PRESENTED

The Respondents do not agree with Petitioner's statement of the issue presented for review. The only question presented by the case and decided by the Court of Appeals is this:

Whether a district court has original jurisdiction of a civil action wherein the amount in controversy exceeds $10,000 and all the plaintiffs (individuals who are trustees of a business trust asserting specific rights and claims as such) are citizens of states other than that of the sole defendant.

STATEMENT OF THE CASE

The Respondents contend that the following is all that is material to consideration of the petition.

The only plaintiffs were individual citizens of the states other than Texas, and the sole defendant was a Texas corporation with its principal place of business in Texas.

The Plaintiffs were all trustees of Fidelity Mortgage Investors, a Massachusetts business trust, and they brought the action in that capacity. Three of the Plaintiffs were also shareholders in the trust, and they alternatively brought the action as representatives of the shareholders. In addition to diversity jurisdiction, the Plaintiffs contended that the district court had jurisdiction because the matter in controversy arose under the securities laws of the United States.

The Plaintiffs in the complaint alleged that they, as trustees of Fidelity Mortgage Investors, advanced money and became the named payees of an $850,000 promissory note from Rockwall Estates, Inc. in reliance upon a written "takeout commitment" of the Defendant Navarro Savings Association. The complaint further alleged that the Defendant failed to take the Plaintiffs out of their financial position as promised and represented and that damages in excess of $10,000 resulted.

The district court dismissed the complaint for want of jurisdiction. Its opinion indicates that it thought the issue was the citizenship of a business trust that was not even named as a party. The Court of Appeals for the Fifth

Circuit reversed, agreeing with the Plaintiffs that they as trustees were the real parties in interest whose citizenship determined the existence of diversity jurisdiction. While the district court had ruled adversely on Plaintiffs' alternative theories of jurisdiction — that they as representative shareholders under Rule 23.2 were real parties in interest whose citizenship determines jurisdiction, and that there was federal question jurisdiction — the Court of Appeals found it unnecessary to consider them or review the trial court's decision relating to them.

While in its opinion the majority in the Court of Appeals indicated approval of the decision of the Second Circuit regarding citizenship, for diversity jurisdiction purposes, of a limited partnership and suggested an analogy to the business trust here, it kept clear the fact that the trust had not sought to sue and had not sued as an entity. The majority did not purport to determine the citizenship of the trust. It held, merely, that the named individual plaintiffs as trustees are real parties in interest and their difference in citizenship from that of the defendant confers federal jurisdiction.

REASONS FOR DENYING THE WRIT

Respondents (who were plaintiffs in the trial court and refer to themselves sometimes as "plaintiffs") respectfully request that Petitioner (sometimes referred to as "defendant") be denied the Writ of Certiorari for the following reasons:

1. The case does not present the question as asserted by petitioner. No REIT or business trust is a party to the action, the Court of Appeals did not purport to determine the citizenship of the trust, and its citizenship is immaterial. The relevant statute, 28 U.S.C. §1332(a) grants original jurisdiction where the "matter in controversy . . . is between . . . citizens of different states." The controversy,

as set out in the pleadings, is between the plaintiffs (as trustees) and the defendant. The trust, as an entity, is not even alleged to be a party to the controversy, and there was no motion or other suggestion in the trial court that it should be made a party, that the plaintiffs were not real parties to the controversy, or that there was any attempt to create diversity by appointment or removal of trustees.

Under 28 U.S.C. §1332(a) to determine its jurisdiction, the Court must merely determine "the matter in controversy" and whether it "is between citizens of different states." Here, the Court of Appeals determined that the matter in controversy was the transactions whereby the plaintiffs (as trustees) became payees of a note and were not taken out of their position by the defendant. The controversy on its face and actually was between the individual trustees on the one side and the defendant on the other. Petitioner's argument does not even attempt to attack that conclusion.

2. There is no conflict of decisions among the circuits. Petitioner does not cite (and the Respondents have not found) any decision of the Supreme Court or of any court of appeals where complete diversity of citizenship existed between the named parties but where jurisdiction was denied merely because individual parties on one side were asserting legal rights as trustees under a declaration of trust. Rather, the decision below follows a long line of Supreme Court precedents establishing this principle: Where trustees or other fiduciaries are the named parties, and they possess the legal rights and powers to prosecute the action in such a capacity (*i.e.*, they are real parties in interest), it is their citizenship rather than that of the non-party beneficiaries which determines diversity jurisdiction. *See, e.g., The Susquehanna & Wyoming Valley R.R. & Coal Co. v. Blatchford,* 78 U.S. 179 (1870); *Dodge v. Tulleys,* 144 U.S. 451, 455 (1892); *Bullard v. City of Cisco,* 290 U.S. 179, 190 (1933).

Petitioner in its argument cites no conflicting opinions of courts of appeals, and most of the district court decisions it cites are cases in which a business trust was the named party and assertions were made that its fictional citizenship was that of the state of its formation, the state in which its principal place of business was located, the states in which its trustees were citizens, or the states in which its beneficiaries were citizens. Respondents deny that those cases deal with the only issue presented by this case. No court of appeals' decision has been found that conflicts with the decision of the majority in the Fifth Circuit below.

United Steelworkers v. R. H. Bouligny, Inc., 382 U.S. 145 (1965) does not control the issues actually presented in this case because here there is no unincorporated association suing or sued, as an entity. *Morrissey v. Commissioner of Internal Revenue,* 296 U.S. 344 (1935) was a tax case and did not relate in any way to diversity jurisdiction except to describe, in general, the nature of a business trust.

3. The Court of Appeals fully considered and correctly decided the material issue. The reasoning by the majority is soundly based on the facts in the case, the Federal Rules of Civil Procedure, and the jurisdictional statute. Even if the majority's analogy to a limited partnership and citation of *Colonial Realty Corp. v. Bache & Co.,* 358 F.2d 178, 184 (2nd Cir.) cert. denied, 385 U.S. 817 (1966) should be construed as a holding as to the citizenship for diversity purposes of the business trust (which it is not), nevertheless it is correct despite contrary holdings in other circuits in *Carlsberg Resources Corp. v. Cambria Savings & Loan Ass'n.,* 554 F.2d 1254 (3rd Cir. 1977), *Riverside Memorial Mausoleum, Inc. v. UMET Trust,* 581 F.2d 62 (3rd Cir. 1978), *Bellview Apartments v. Realty ReFund Trust,* No. 78-1623 (unpublished to date) (4th Cir. August 1979). Since in a diversity action state substantive law governs, when an unincorporated business organization is a named party (which did not occur in the instant case), the Court should

disregard the organization (which has no citizenship) and determine from substantive law and the contracts, charters, trust documents, or other appropriate sources the identity of the individuals who have the right of action or liability — that is, the real parties to the controversy, the real parties in interest — and determine diversity jurisdiction from their citizenship. See Note, Diversity Jurisdiction over Unincorporated Business Entities: The Real Party in Interest as a Jurisdictional Rule, 56 Texas L. Rev. 243, 250-251 (1978). If FMI had been named as a party in this case, that sound analysis would have produced the same result.

4. There are alternative grounds to support the result in the court of appeals. The Court of Appeals has not reviewed the trial court's rejection of alternative theories of jurisdiction. If it should be held that the beneficial shareholders are the real parties in interest and the trustees are not, three of the plaintiffs are shareholders bringing the action alternatively on behalf of all shareholders under Rule 23.2. Diversity jurisdiction exists even under this alternative determination of the identity of the true parties to the controversy. See, *e.g. Supreme Tribe of Ben Hur v. Cauble,* 255 U.S. 356 (1921). Further, there was asserted federal question jurisdiction. However, as a result of its holding, the Court of Appeals found it unnecessary to determine those issues.

CONCLUSION

The petition does not raise any issue presented by the case. The matter in controversy is between the individual Plaintiffs, who as trustees have the right to assert the claim and are thus the true parties in interest, and the Defendant. The Court of Appeals correctly decided the issue before it.

There is no conflict of decisions or other special or important reason for granting a writ of certiorari. This Court should deny Petitioner's request for a writ of certiorari.

Respectfully submitted.

JAMES A. ELLIS, JR.
Attorney of Record for Respondents

CERTIFICATE OF SERVICE

I, James A. Ellis, Jr., a member of the Bar of the Supreme Court of the United States, certify that three copies of the foregoing Respondents' Brief in Opposition have been served upon counsel for Petitioner by United States mail, first class, postage prepaid. I further certify that all parties required to be served have been served.

October 24, 1979.

/s/ James A. Ellis, Jr.

James A. Ellis, Jr.